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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: JUL 19 2012

OFFICE: NEBRASKA SERVICE CENTER

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a senior geographic information systems (GIS) analyst at [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of previously submitted exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on February 7, 2011. In an accompanying statement, counsel stated:

> [The petitioner] is an extraordinary scientist in the area of [redacted] He has made significant and substantial contributions in this field, developing new approaches and methodological techniques in the analysis and mapping of land use/land cover change and to the identification of wetland and other critical ecological resources which is vital to the ability of the U.S. to monitor and manage its natural resources. He is employing his

> expertise in remote sensing to conduct groundbreaking research for the county government entity, [redacted]
>
> . . . [The petitioner's] research efforts focus on developing, improving, and refining multiple remote sensing techniques and integrating the results with GIS data to help identify natural resources and capture and analyze the changes in the Earth's surface. His work significantly benefits not only remote sensing research but environmental research on a national scale. . . .
>
> The proposed benefits of [the petitioner's] research are national in scope and are not isolated to [redacted] or the [redacted]. [The petitioner's] innovative contributions in remote sensing can easily be expanded beyond the scope of the projects based in [redacted] and serve[] the interest of the U.S. at the national level.

The petitioner's own *curriculum vitae* lists the following responsibilities of a senior GIS analyst:

- Change detection analysis using high spatial resolution, multispectral [redacted] satellite imagery to monitor changes in environmentally sensitive area as a part of [redacted] monitoring program
- Land cover mapping using high resolution [redacted] imagery for the [redacted] program
- Wetland mapping using high resolution [redacted] radar data, and various topography-derived products.
- ALOS AVNIR-2 image processing and land cover classification for the [redacted] monitoring program using [redacted] software
- Land cover and wetland ground truth data collection using segmentation-based field map
- QA/QC analyses of various maps (i.e., land cover, wetland, change detection maps)
- Analyze GIS data to answer various County's science and engineering questions

Nine witness letters accompanied the initial filing of the petition. Three of the witnesses are professors at [redacted], where the petitioner earned his master's and doctoral degrees. Professor [redacted], the petitioner's graduate advisor, explained the nature of the petitioner's work:

> Land cover (LC) refers to the natural and man-made material located on the surface of the earth, whereas land use (LU) refers to how humans use the land. Land use/land cover (LULC) can be mapped using remotely sensed imagery, such as satellite data or aerial photography. . . .

> Challenges in LULC mapping and its change detection over time can come from the remote sensing data itself . . . [or] the complexity in landscape changes and the image processing algorithms used in LULC mapping. . . .
>
> [The petitioner] developed an improved LULC classification algorithm using a graphical user interface. Traditional classification algorithms lack an ability to handle noise in the remote sensing dat[a]. [The petitioner] minimized data noise by introducing the singular value decomposition (SVD) method. . . . He was the first person to develop a LULC mapping algorithm using the SVC method incorporated into an object recognition technique. His process produced highly accurate LULC maps with an overall accuracy of >89%.
>
> . . . In summary, [the petitioner] developed a framework, which includes developing improved LULC maps and assessing hydrologic impacts using LULC products, that can be used in future efforts to study urbanizing watersheds to understand the hydrological impact of LULC change in a watershed on a larger scale.

Professor [redacted] stated that the petitioner has "developed new approaches to the analysis of land cover change and to the identification of wetland and other critical ecological resources."

Professor [redacted] stated that the petitioner "has shown that one can effectively minimize costly and time consuming large scale testing. . . . Previously, less well-qualified Ph.D.'s have been assigned similar objectives, but without [the petitioner's] high level of expertise, their results have been unsatisfactory."

The letters from OSU faculty members pertained to the petitioner's graduate school research. Original research is a fundamental part of graduate study, and graduate study is not a career unto itself. It is, rather, preparation for future employment. Therefore, the national scope of one's graduate research is not a sure sign that one's future work will have national scope. It is with this in mind that the AAO turns to letters from the petitioner's current colleagues and collaborators. [redacted] habitat specialist and critical area project manager at [redacted], stated:

> [The petitioner's] work on land cover and wetland mapping in Ohio was very innovative and sophisticated. . . .
>
> The [redacted] was initiated in 2007 by County leaders to evaluate the effectiveness of the County's regulations and environmental initiatives in protecting critical areas such as wetlands and streams. . . . The central element of the program involves using satellite imagery, aerial photos, radar and other GIS data to classify critical areas and track changes in their functions over time. . . .

> As the lead [redacted] for the program, [the petitioner] is a core member of the project team and the lead for all remote sensing related monitoring tasks. He developed the critical area mapping approach, identified input data sources and developed processing routines for . . . [the] data sources. . . .
>
> To create a highly accurate land cover map, [the petitioner] developed an innovative approach called spectral rotation. Through this technique, he was able to better distinguish between similar land cover classes and increase the overall map accuracy from 81% to 88%.
>
> Wetland mapping was another challenging aspect of the project. . . . [The petitioner's] wetland model greatly improved wetland mapping accuracy to over 80%, which is very high relative to the accuracy of other wetland mapping in this region reported in the scientific literature. . . .
>
> He has presented his work . . . at local . . . and national conferences. . . . He prepared three journal articles on the classification approach for submission to peer-reviewed journals. . . . Through these efforts, his work has been widely disseminated throughout the scientific community.

[redacted] public works supervisor in the [redacted] Stewardship, Planning and Analysis Section, stated: "The methods and protocols that [the petitioner] established can be applied to similar remote sensing work in other jurisdiction[s] across the United States."

[redacted] senior research scientist at the [redacted] "worked very closely with [the petitioner] for over a year." [redacted] stated that the petitioner's "work is of profound significance to the wetland mapping community."

[redacted] wetland biologist with the [redacted], stated that the petitioner "is developing models that will allow long-term monitoring of the condition of streams and wetlands which will help ensure their protection and long-term sustainability. . . . The models developed by [the petitioner] may be able to be adapted and applied at the regional and national scale."

Dr. [redacted]r., senior research [redacted] for the [redacted] stated:

> I am currently leading a change detection demonstration project using high resolution satellite imagery to evaluate changes in land cover between 2006 and 2009. . . .
>
> Through my work on this project, I recently met and became familiar with the work of [the petitioner]. He is working on a similar project. . . . I was very pleased to find a colleague with whom I could collaborate and compare techniques. I look forward to

> doing a comparison of change detection results using different data stacks within the Snohomish Basin, the area of overlap in our analyses.

The ninth witness is not in either Ohio or Washington. [redacted] assistant professor at the [redacted], first met the petitioner at a 2008 conference in Portland, Oregon. [redacted] letter indicates that the petitioner's work receives exposure outside of the local area where that work takes place. [redacted] agreed with other witnesses that the petitioner "developed an innovative approach to accurately map wetlands in a consistent and repeatable manner" which "can be successfully applied to other wetland areas," and that the petitioner's method resulted in "increased accuracy (over 5% increase from the maps based on the conventional methods)."

The majority of the petitioner's submitted work product appears to be local in nature, consisting of reports prepared for the [redacted] government relating to lands within its jurisdiction. Nevertheless, the initial submission included copies of materials that the petitioner prepared for presentation at professional gatherings, such as an abstract of a paper in preparation for the 2011 annual conference of the [redacted]. The petitioner was the [redacted] of the paper. The abstract reads, in part:

> [O]ur understanding about the distribution of wetlands across the landscape, is limited due to the time-consuming process of wetland identification and delineation.
>
> [redacted] developed an efficient wetland mapping methodology using remote sensing techniques. . . . The flexibility provided by this product makes it an important tool in development planning and wetland protection. While development of this technique occurred in [redacted], the framework can be applied elsewhere.

On May 17, 2011, the director issued a request for evidence, instructing the petitioner to "submit documentary evidence to establish that the benefits of [the petitioner's] work will be national in scope" and to show "a past record of specific prior achievement that justifies projections of future benefit to the national interest."

In response, counsel asserted that the petitioner's "methodological developments can be applied to any geographic area in the United States or in the world. . . . There is nothing localized about [the petitioner's] contributions since he has created **methodological techniques and tools**" (emphasis in original).

With respect to the impact of the petitioner's work, counsel contended that the petitioner "has created new methodological techniques that have far-reaching impact on environmental research." Counsel listed the petitioner's past projects, which the petitioner had already documented and described in his initial submission.

Two witness letters accompanied the response to the request for evidence. Like most of the petitioner's initial witnesses, these two witnesses have worked with the petitioner. [redacted], who has "known [the petitioner] for 10 years," is now a [redacted] and an associate research scientist at the [redacted] stated:

> I have known [the petitioner's] work since I was working at the [redacted] [The petitioner's] meticulous research skills on remote sensing data and interdisciplinary knowledge . . . are profound, and will cut across several disciplines in Earth science, engineering, ecology, climate, international security, political science, and more.
>
> [The petitioner's work], in my opinion, should extend to the entire nation. . . . I am highly confident that [the petitioner] will benefit the nation in environmental and urban managements and remote sensing.

[redacted] senior research scientist at [redacted], stated:

> I originally met and began working with [the petitioner] in 2008 under a contract that was developed between [redacted] . . . and [redacted] . . . The methods developed and implemented in [redacted] by [the petitioner] provide a nationally viable approach to probabilistically capture wetlands with a high-degree of certainty.
>
> . . . The implementation of methods developed by [the petitioner] would significantly contribute to estuarine research in the [redacted] system, as well as estuarine systems nationally. . . .
>
> Currently, there is no accurate and defensible source of wetlands data for the nation to help assess national bioenergy production potential and optimization. [The petitioner's] methods are key to contributing to an accurate national assessment of this magnitude.

The witnesses quoted above did not indicate that the petitioner's work has had a significant influence beyond his own employer – rather, [redacted] stated that it "should" and "will" have such an impact, while Mr. [redacted] asserted that the petitioner's efforts "would significantly contribute" to ongoing efforts and that "there is substantial opportunity" for the petitioner to do so.

The director denied the petition on September 2, 2011. The director listed the three factors set forth in *NYSDOT* (substantial intrinsic merit, national scope and serving the national interest to a substantially greater degree than a minimally qualified United States worker), and stated: "The self-petitioner sufficiently established the first and third factors; however, the self-petitioner has failed to establish that the proposed benefit will be national in scope."

To support the conclusion that the petitioner's work lacks national scope, the director stated:

> The self-petitioner's methodology may very well have the potential to be used nationally as several of the letters of support speculate. However, no evidence has been submitted which suggests the self-petitioner's method is being used by other practitioners or researchers in other parts of the country. Nor is there any evidence of the self-petitioner using his methodology and benefiting other parts of the country beside the states of Washington, Ohio, and New York.

The director acknowledged the potential national application of the petitioner's methods, but found that the petitioner had not submitted any evidence that those methods were actually in use outside of [redacted]. The director therefore concluded that the proposed benefit from the petitioner's work lacked national scope.

On appeal, counsel contends at length that the director "**erroneously concluded that the proposed benefit of Petitioner's research contributions is not national in scope**" (counsel's emphasis). The AAO finds that the petitioner meets the "national scope" test because his innovations are not intrinsically limited to a particular locality; they can apply throughout his field. The petitioner's participation in scientific conferences affords him the opportunity to disseminate his work beyond [redacted]

The director found that the petitioner had not shown existing use of his latest work outside of [redacted] Counsel does not contest this finding, instead asserting that it is irrelevant to the question of national scope. The director's core finding, however, remains a valid concern. The AAO considers the issue of the petitioner's actual (rather than potential) impact and influence on his field to relate to the third prong, rather than the second prong, of the *NYSDOT* national interest test, but its exact placement does not affect its overall relevance. Counsel and the petitioner cannot disregard the issue of the impact of the petitioner's work simply because the director mistakenly characterized it as a national scope issue.

Counsel quotes from prior witness letters that "addressed the applicability of [the petitioner's] work on a federal/national level," but submits nothing to show that this applicability has translated into wider practical use. Counsel identifies projects both before and after the petition's filing date "outside of the [redacted]t these are projects in which the petitioner himself has participated, either in Washington or, in the case of student work, in Ohio.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, evidence of projects after the petition's filing date would not establish that the petitioner was already eligible for the benefit sought as of the filing date. Even then, the record contains no evidence of such projects; counsel, on appeal, refers to such evidence as "forthcoming" but it remains absent from the record. Finally, even

this project, mentioned on appeal, concerns a project in Washington State. Counsel's claim that the [redacted], "a federal agency," partly funded this project does not establish wider federal implementation of the petitioner's work.

The petitioner's methods would serve the national interest through their use, rather than through the potential of future application. Thus, speculation about possible future adoption of the petitioner's methods does not establish his present eligibility for the waiver. At best, it points to possible future eligibility. As such, the application for the national interest waiver is essentially premature.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.